No. SC 86339

IN THE SUPREME COURT OF MISSOURI

STATE EX REL. PAUL E. HOOVER, Jr.,

Petitioner

Vs.

THE HONORABLE TED BOEHM,
Sheriff of Boone County, Missouri,

Respondent

WRIT OF HABEAS CORPUS REGARDING BOONE COUNTY CASE NO. 03CR170885-01

REPLY BRIEF FOR PETITIONER

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REPLY TO RESPONDENT'S ASSERTIONS

Respondent in his brief asserts the following on Page 7:

"*Review of that transcript, previously submitted to the court as Respondent's Exhibit A, discloses that petitioner objected only to "those police reports" (Tr. 5). Petitioner had no objection, and in fact he elicited the testimony by the probation officer about the wife's statements (Tr. 8).*"

The objection made was "*Your Honor, I'm going to object on the basis of hearsay and right to confrontation to statements from any other parties with regard to - - that may be contained in those police reports.*" (Tr. 5) The State had not disclosed prior to the hearing in any of its reports that Mr. Hoover's Probation Officer had talked with his estranged wife and Mr. Hoover had no notice the Probation Officer would seek to introduce these hearsay statements attributed to Petitioner's estranged wife. This Honorable Court in *Mack V. Purkett,* 825 S.W. 2d 851, 854, 855 (Mo banc 1992) citing *Morrisey v. Brewer,* 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) set forth "*The minimum requirements of due process in a final parole revocation hearing include:*

a.) written notice of claimed violations of parole;

b.) disclosure to the parolee of evidence against him;

c.) opportunity to be heard in person and to present witnesses and documentary evidence;

d.) The right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);

e.) A 'neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and

f.) A written statement by the factfinders as to the evidence relied on and the reason for revoking parole."

Subsequently in Mack this Court spoke about the "*parolee's right to confront witnesses is balanced against the grounds asserted by the government for not requiring confrontation.*" *Id*. at 856. In this matter the government presented no grounds to the trial court to meet the two-part test as to 1) why confrontation was undesirable or impracticable and 2) whether the hearsay evidence sought to be admitted bears substantial indicia of reliability. The government also failed to disclose to petitioner prior to the hearing that his probation officer had interviewed his estranged wife and would be seeking to introduce her hearsay statements at the hearing, in violation of his due process rights.

Respondent in his brief asserts the following on Page 8-9:

"*The determination in Moore v. Stamps, 507 S.W.2d 939 (Mo. App. E.D. 1974) was made with the acknowledgments that: (1) a probation revocation is not a part of the criminal prosecution process and, therefore, the evidence standard is not the reasonable doubt standard but that the hearing judge need only be reasonably satisfied that terms of probation were violated; and (2) hearsay evidence may form a basis to revoke probation if the probationer or counsel may cross-examine witnesses offering hearsay evidence. Id. at 949. In making the determination, the court further pointed out that although Morrissey and Gagnon do not apply strictly to judicial revocation of probation, "the spirit of those decisions" requires the minimal rights of due process set forth in Moore. Id.*"

At the probation violation hearing the order of protection that petitioner is alleged to have violated was not introduced into evidence, nor was the criminal information that charged Petitioner with having violated the order of protection. The State did not request the trial court to take judicial notice of the order, nor did the trial court on its own motion take such notice.

When Petitioner's Probation Officer was questioned as to the conditions of the order that permitted marital counseling and communication to pick-up property, she admitted that she had not seen the order of protection. (Tr. 11).

ARGUMENT

Petitioner is at a **loss** as to how the trial court could find he violated the conditions of an order of protection when 1) the order was not presented to the trial court and 2) none of the state's witnesses had seen the order prior to testifying at probation revocation hearing. Petitioner testified (Tr. 15-16) that the order of protection permitted communication with regard to marital counseling and to arrange for him to pick-up his property and that he had not initiated any contact with her except as permitted by the order, but that she continuously called him.

Petitioner does not contend that he is entitled to all of the benefits of the holding from the U.S. Supreme Court in its landmark review of the right to confrontation in *Crawford v. Washington*, 124 S.Ct. 1354 (2004), but the limited right to confrontation that existed pre-*Crawford*, must be re-examined

in light of the *Crawford* holding. Petitioner believes that this Court's holding in *Mack v. Purkett*, 825 S.W. 2d 851 (Mo. banc 1992) was violated by the trial court's actions in denying Petitioner his due process and confrontation rights and that the basis of the *Mack* ruling was impacted by *Crawford* and that a more vigorous assessment of hearsay and confrontation is now necessary in probation or parole revocation hearings. Further, the burden is on the State, if it seeks to limit the Defendant's rights, to establish the basis under the two-part test outlined in *Mack*. In this matter the State made no attempt to satisfy the *Mack* standard, even under its pre-*Crawford* holding.

CONCLUSION

For the foregoing reasons Petitioner believes he is unlawfully restrained by Respondent and that is entitled to be released from his incarceration and that full and final writ of habeas corpus should issue ordering his release from confinement.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached reply brief complies with the limitations contained in Supreme Court Rule 84.06(b), includes the information required by Rule 55.03 and contains 1154 words, excluding the cover, this certification, as determined by Microsoft Word XP, the word processing program used by Petitioner to compile the instant Reply Brief. Pursuant to Supreme Court Rule 84.06(g) the attached disk has been scanned for viruses and is virus free.

_____
Stephen Wyse